

**Administration's Responses to Points raised on 31 May 2001
by Members of the Bills Committee
on the Chief Executive Election Bill**

(for submission to the Bills Committee meeting to be held on 12 June 2001)

Winning candidate to declare he is not a member of political party

Q1: What is the legal advice which confirms that the proposal is in compliance with the Basic Law and does not contravene the International Covenant on Civil and Political Rights.

A1: Our legal advice confirms that the proposed restriction is consistent with the requirements as to freedom of association as guaranteed under Article 27 of the Basic Law and Article 22 of the International Covenant on Civil and Political Rights (ICCPR).

Freedom of association is not an absolute right under ICCPR. Article 22 of the ICCPR provides that no restrictions may be placed on the exercise of this right –

“other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

Our legal advice considers that the proposed requirement meets the criteria laid down in the ICCPR.

Prescribed by law

The proposed restriction would be in the form of legislation and would be prescribed by law.

Legitimate aim

The proposed restriction pursues a number of legitimate aims, particularly the interests of ‘ordre public’ and the protection of the rights and freedoms of others. The term ‘ordre public’ means more than public order and has been described as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’. The Court of Final Appeal has held that this concept ‘must remain a function of time, place and circumstances.’

Its purpose is to ensure the proper functioning of the political order constituted by the Basic Law, under which the Chief Executive has a unique and pivotal role. By ensuring his independence from all political parties, the restriction enables the Chief Executive to perform his constitutional role without divided loyalties, or conflict (or perceived conflict) of interest, and enables all political parties to operate on a level-playing field.

Necessary in a democratic society

The requirement that the restriction must be ‘necessary in a democratic society’ does not mean that such a restriction must be needed in all democratic societies. It means that the restriction must be one which may claim to spring from ‘democratic society’, which has a special meaning. It means a society which is characterised by certain fundamentals, including freedom of expression and legal proceedings held in public. One particular fundamental is that political parties play an essential role in ensuring pluralism and the proper functioning of democracy. The European Court of Human Rights has said many times that there can be no democracy without pluralism, tolerance and broadmindedness.

The word ‘necessary’ is a relative term, but means more than desirable. The Court of Final Appeal has confirmed that the word ‘necessary’ in this context should be given its ordinary meaning, and that no assistance is to be gained by substituting for ‘necessary’ a phrase such as ‘pressing social need’.

In the context of Hong Kong's unique political situation, it is necessary that the Chief Executive should carry out his constitutional duties in a manner that encourages, rather than suppresses, pluralism and the healthy development of political parties. By remaining independent of any particular political party, the Chief Executive ensures that there is a level-playing field in which parties can compete and develop.

Rational and proportional

In order to be justified, a restriction on freedom of association must be a rational and proportional means of achieving the legitimate aim. There must be a fair balance between the demands of the community and the requirements of the individual's fundamental rights.

Given that the purpose of the restriction is to ensure the proper functioning of the current political order, and the encouragement of pluralism, prohibiting the Chief Executive from being a member of any political party is a rational and proportional means of achieving that purpose.

The restriction is very narrow, in that it would not restrict –

- (1) who may be a candidate for CE;
- (2) the CE's freedom of thought or expression;
- (3) the CE's ability to formulate policies in ways that are in line with those of any political party;
- (4) the CE's ability to communicate with any political party;
- (5) the continuing political activities of any political party.

Hong Kong's unique constitutional order

The Chief Executive of the HKSAR is not on the same level as the Prime Minister of a democratic State. Further the CE is not in the same position as the former Governors of Hong Kong, nor the Governor-Generals of States like Australia, Canada or New Zealand. The Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China has a unique position of power and responsibility. Hong Kong is physically and legally a part of China – although by the Joint Declaration and the Basic Law it is guaranteed considerable autonomy. The Chief Executive is accountable both to the Central People's Government and the HKSAR. The HKSAR is not a province but part of a unitary state, yet has power to make laws for the HKSAR, subject to certain restrictions. The Chief Executive must act as the conduit and linkage to the Central Government. This role is prescribed by the concept of One Country Two Systems. The Chief Executive must maintain the appropriate relationship between the One Country and must apply the Two Systems. This role is ordained by the law of the Central People's Government, by the law of the HKSAR and indeed by international law via the Joint Declaration. There is no comparable position in any democratic State where a geographically defined part of that State operates permanently (within a 50 year time frame) a political, social and legal system that is not only different from, but is substantially and fundamentally at variance with, the physical remainder of the State.

That scenario distinguishes the position from that in the United States of America, where the President is the candidate for a political party, and in other democratic States. The position of the CE in the HKSAR can be differentiated from the position of Prime Ministers and Presidents, etc.

Why cannot the CE be a member of a political party? The answer lies in a combination of features that are unique to the HKSAR, and some features which are common to all democracies. The answer is conceptual and pragmatic and is affirmed by the specific requirement in the Basic Law, the highest law, for the ideals of democracy to be accomplished in a gradual and orderly fashion.

The BL lays down a blueprint for the development of the political structure which envisages changes over time. The “ultimate aim is for the CE to be selected by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures”. Annex I of the Basic Law provides a mechanism to change the selection method for the terms subsequent to the year 2007. In due course, the political structure will be reviewed in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress. When the question of progress towards universal suffrage is addressed, regard will be had to the “actual situation” then prevailing. The question of CE’s membership of a political party will be reconsidered in the light of the prevailing circumstances.

The political institutions of the HKSAR are currently still in an evolutionary stage. In determining the “method for selecting the CE in the light of the actual situation in Hong Kong” now, it has to be borne in mind that political parties are still at an early stage of development. Political parties in Hong Kong have not developed to the level of maturity of those in Western democracies.

In performing his roles and in discharging his full range of powers under the BL, the CE must act impartially and in the overall interest of the HKSAR. At this stage of Hong Kong’s political development, requiring the CE to resign from political party will ensure that the CE will act in the interests of the whole community in discharging his duties and responsibilities.

Regulation of electioneering activities

Q2: How are the electioneering activities in respect of an incumbent head of state seeking re-election in some overseas countries regulated?

A2: We have written to our relevant overseas offices and asked them to gather information in this regard. Once the overseas information is available, we shall apprise the Bills Committee immediately.

Participation of senior government officials in electioneering activities of CE election

Q3: Whether government officials should be allowed to express views at public or other functions which could be seen as in support of a particular candidate for the CE election or otherwise?

A3: The guidelines which government officials have to follow in respect of the CE Election will be drawn up after the CE Election Bill has been passed into law. The Administration will take into account, amongst other things, the EAC guidelines and Members' views before promulgating the guidelines.

Attached is a copy of the existing guidelines governing the participation of government officials in LegCo Elections.

The underlying principle of the guidelines is to strike a balance between the need for civil servants to remain impartial and avoid possible conflict of interest and the individual rights of civil servants who should enjoy as residents of Hong Kong. The guidelines for LegCo elections respects the rights of the restricted group of civil servants to express their views privately. They may make comments in the same way as any Hong Kong residents may provided such comments are not made publicly, including to the media.

Q4: Whether the Administration will consult Members on the circular to be issued by the Civil Service Bureau on the participation of civil servants in electioneering activities for the CE election?

A4: The Administration will inform LegCo of the gist of its draft circular on the participation of civil servants in the electioneering activities for the CE election in due course.

Election expenses limit

Q5: What is the Administration's position on setting a ceiling on the election expenses for CE election? Whether other democratic countries impose a ceiling on election expenses for election of head of state and if so, what is the ceiling?

A5: After the CE Election Bill has been passed into law, we intend to prescribe, by regulation subject to negative vetting by LegCo, an election expense limit for the CE election under the Elections (Corrupt and Illegal Conduct) Ordinance.

The election expense limits for presidential election in a number of oversea countries are as follows:

Country	Election Expense Limit
France	Limit for candidate- (a) First round : 90 million francs (HK\$95.09 million) (b) Second round: 120 million francs (HK\$126.78 million)
Portugal	6,000 times the monthly national minimum wage - \$P342 million (HK\$11.97 million).
United States	Election expenses limit applies only to candidates seeking public funding support for their election campaign. Candidates may not spend more than the amount of the grant, which is about US\$108 million (HK\$842.4 million) per candidate for the 2000 presidential election. Candidates who

	forgo public funding may spend unlimited amount of money.
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In countries such as UK and Australia, where the parliamentary system is exercised, the election expense limits for their Lower House elections are as follows:

Country	System of voting	Election Expense Limit
Australia	Preferential Elimination	Nil
United Kingdom	First past the post	<ul style="list-style-type: none"> • Limit for a candidate – <ul style="list-style-type: none"> (a) £ 4,964 (HK\$56,068.38) + 4.2 pence (HK\$0.47) per elector in “borough constituencies” (i.e. densely populated urban areas) (b) £ 4,964 (HK\$56,068.38) + 5.6 pence (HK\$0.63) per elector in “county constituencies” (i.e. country side and rural areas) • Limit for a party: £ 28,500 (HK\$321,907.50) times the number of constituencies contested by that party

Constitutional Affairs Bureau
8 June 2001

**Extract from
Civil Service Bureau Circular No. 8/2000**

**Civil Servants Standing for Elections
and Participating in Electioneering Activities
for the Legislative Council Elections
and the Election Committee Subsector Elections**

This circular provides guidelines for civil servants wishing to stand for the Election Committee Subsector Elections and/or to participate in electioneering activities arising from the Legislative Council Elections and/or the Election Committee Subsector Elections.

General Principle

2. Government's policy on civil servants taking part in the conduct of public affairs is to ensure that civil servants should enjoy their civil and political rights as citizens but at the same time the civil service should remain impartial and no conflicts of interest should arise. We thus have regulations on the prevention of conflict of interest situations and requirements that civil servants must seek approval for outside activities. We have also promulgated guidelines for civil servants on their participation in political activities. The various regulations and guidelines are set out in the Annex. These guidelines and regulations have worked well in ensuring that the civil service, in particular those civil servants who are directly involved in policy formulation and promulgation, in the enforcement of public order, and in decision making at the policy level will not be involved in conflict of interest situations arising from political and/or electioneering activities.

Legislative Council Elections and Election Committee Subsector Elections

3. Under the Legislative Council Ordinance (Cap. 542), civil servants are disqualified from seeking candidature and election to the HKSAR Legislative Council.

4. There is no objection in principle to individual civil servants, other than those listed in paragraph 5 below, putting their names forward to become a member of the Election Committee, and/or supporting electioneering activities in relation to the Legislative Council Elections or the Election Committee Subsector Elections provided that it does not give rise to any conflict of interest with their official duties and that the Civil Service Regulations on outside work are observed. A non-directorate member of the engineering staff may, for example, campaign for a person seeking election to the Legislative Council under the Engineering functional constituency, subject to there being no official dealings between the two of them. Staff associations and their office bearers, again other than those listed in paragraph 5, may support electioneering activities as representatives of an association.

Restricted Group

5. Certain officers at the senior level and those who may be particularly susceptible to accusations of bias because of the nature of their duties, are prohibited from becoming a member of the Election Committee and from participating in any electioneering activities within the Hong Kong context. Officers subject to prohibition are -

- (a) all Directorate Officers;
- (b) all Administrative Officers irrespective of rank;
- (c) all Information Officers irrespective of rank;
- (d) all disciplined officers of the Hong Kong Police Force (under Police General Orders); and
- (e) officers acting in the grades or ranks in (a), (b) and (c) above with a view to substantive appointment thereto.

This restriction applies equally to officers on the permanent and pensionable establishment and those on agreement terms.

6. For the purpose of paragraph 5 above, electioneering activities within the Hong Kong context include, for example -

- (a) lending support to, or participating in political activities of a political organisation (e.g. signature campaign, public rally);
- (b) speaking publicly (including to the media) on matters of a political nature other than in the course of official duties;
- (c) distributing political publications (e.g. pamphlets);
- (d) promoting or advocating political views or the electioneering platform of any candidate; and
- (e) canvassing or campaigning on behalf of a political organisation.

7. Officers listed in paragraph 5 above are advised that allowing personal information or photographs to be used in election advertisements or related canvassing materials may be implied as giving support to the political views or the electioneering platform of a candidate. Such conduct therefore falls within the context of electioneering activities in paragraph 6 above and is accordingly prohibited.

**Relevant Civil Service Regulations
Governing Civil Servants' Participation in Outside Activities**

- (a) CSR 410 : Disciplinary action and punishment;
- (b) CSRs 520 - 525 : Public communications by officers;
- (c) CSRs 550 - 559 : Outside work;
- (d) CSB Circular No. 26/90 : Civil servants joining political organisations and participating in political activities;
- (e) CSB Circular No. 19/92 : Conflict of interest; and
- (f) CSB Circular No. 15/97 : Civil servants standing for elections and participating in electioneering activities.